In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-896

BURLINGTON NORTHERN, INC., PETITIONER

v.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This Memorandum is submitted in accordance with the Court's April 3, 1975 request, on behalf of the federal respondents, the National Mediation Board ("NMB") and its named members. When the case was before the court of appeals, the federal respondents advised that court that they had no interest in the issues raised on appeal, and consequently did not participate in the case. Petitioner seeks review of the court of appeals' ruling that an Employees Merger Protection Agreement, to which petitioner and respondent labor organization were signatories, was not inconsistent with the Railway Labor Act.

573-785—75——1

1. Petitioner Burlington Northern, Inc., was formed in March, 1970, with the approval of the Interstate Commerce Commission by the merger of the Chicago, Burlington & Quincy Railroad ("CB&Q"), the Great Northern Railway, the Northern Pacific Railway and the Pacific Coast Railroad (Pet. App. 13a). Prior to the merger and with National Mediation Board certification, respondent American Railway Supervisors Association ("ARSA") represented the mechanical supervisors on the CB&Q, and the technicians of the Great Northern. An Employees Merger Protection Agreement, executed by the Burlington Northern, its component lines, and the labor organizations, including ARSA, bound the Burlington Northern to the bargaining agreements of its components that were in effect at the time of consummation of the merger "subject to changes in accordance with the provisions of the Railway Labor Act" (Pet. App. 28a). Section 9 of that Agreement allowed the labor organizations and the Burlington Northern to refer disputes or controversies arising under the Agreement to arbitration (Pet. App. 29a).

Subsequent to the merger, Burlington Northern refused to recognize and treat ARSA as the designated representative of the mechanical supervisors formerly employed by CB&Q and the technicians formerly employed by the Great Northern, on the ground that ARSA lacked the allegiance of a majority of any craft or class of employees of Burlington Northern, the successor company (Pet. App. 28a). ARSA served notice of its intent to refer the dispute to arbitration, and the Burlington Northern brought

suit seeking to enjoin the arbitration and also seeking a declaration confirming the company's actions (Pet. App. 31a). ARSA counterclaimed to compel arbitration and for damages (*ibid.*) The district court dismissed the complaint and counterclaim, holding that it was without jurisdiction to decide what is considered a labor representation issue within the exclusive jurisdiction of the National Mediation Board. *Burlington Northern, Inc.* v. *American Ry. Sup. Ass'n,* 350 F. Supp. 897, 904 (N.D. Ill.) (Pet. App. 25a–38a); 359 F. Supp. 1047, 1049–1050 (N.D Ill.) (Pet. App. 39a–44a).

On appeal, the court of appeals affirmed the dismissal of the complaint and reversed the dismissal of the counterclaim (503 F. 2d 58; Pet. App. 11a–21a). The court of appeals reasoned (Pet. App. 17a):

> In our view, the dispute before us is not one under 45 U.S.C. § 152 Ninth, because no employee or other union has challenged ARSA's certification. The cases cited by the District Court in support of its holding all involve representation disputes between unions or employee groups under 45 U.S.C. § 152 Ninth. *Burlington Northern, Inc.* v. *American Ry. Sup'rs Ass'n, supra,* 350 F. Supp. at 901, n. 8 and 904. The issue before the court in this case, the effect of the pre-merger agreement between the two parties to this action, is a common-law contract determination within the province of the federal courts and is not reserved to the exclusive jurisdiction of the NMB.

Turning to the merits, the court of appeals held that the National Mediation Board's practice of re-

quiring carrier-wide representation of crafts or classes in the context of proceedings under the Railway Labor Act, 45 U.S.C. 152 Fourth and Ninth, did not affect the validity of the Merger Protection Agreement, nor prevent ARSA from representing after the merger the mechanical supervisors and technicians employed by the component railways before the merger (Pet. App. 17a–18a). Accordingly, the court of appeals reversed and remanded the dismissal of the counterclaim with directions that the Burlington Northern be ordered to arbitrate its disagreement with ARSA, according to the terms of the Employees Merger Protection Agreement.

2. The issue in this case is whether Burlington Northern may be required under the Employees Merger Protection Agreement to recognize and bargain with the ARSA. The two relevant questions in terms of the interest of the National Mediation Board are: (a) whether the issue in the case is one for Board determination and (b) whether, regardless of who determines the issue, the asserted obligation to bargain is inconsistent with the Railway Labor Act.

a. The National Mediation Board has authority under 45 U.S.C. 152 Ninth to certify the representatives of any craft or class of employees on a system-wide basis when "any dispute shall arise among a carriers' employees as to who are the representatives of such employees * * *." The issue in this case is not such a dispute, and neither Burlington Northern nor the ARSA suggest that it is. There is therefore no issue for Board determination and the Board has no

jurisdiction over the parties' dispute concerning the enforceability of their private agreement.

b. Burlington Northern's contention is not that the dispute is one for Board determination, but more basically that—regardless of the proper forum for resolving the issue—the Employees Merger Protection Agreement is inconsistent with the Railway Labor Act. In the view of the National Mediation Board, however, nothing in the Railway Labor Act prohibits a carrier from entering into a voluntary agreement to recognize a collective bargaining representative of a class or craft that is not system-wide, even though there has not been a National Mediation Board certification of a craft or class representative.[1] The Board disagrees with Burlington Northern's contention (Pet.

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[1] There has been no certification by the Board since the merger here. In 1973 the ARSA applied to the Board to determine the representation of mechanical supervisors employed by the Burlington Northern on a system-wide basis. However, the Board found no basis for certification because a majority of the eligible mechanical engineers chose not to participate in the ensuing representation election (Pet. App. 50a–51a). The ARSA's failure to gain certification did not affect any obligation Burlington Northern may have under the employees' protection agreement to bargain with the ARSA as the representative of the mechanical supervisors of the merged CB&Q rail line.

Further, the Board's dismissal on June 3, 1970 of a petition by the Great Northern Railway Company Technical Employees Association to represent the Great Northern technicians as moot, because the Great Northern had ceased to exist after the merger (Pet. App. 52a–53a), did not signify that the merger terminated ARSA's status as the certified representative of the technicians. The Board's Executive Secretary so stated on two occasions prior to the institution of this action, as the court of appeals noted (Pet. App. 10a).

23–25) that the merger protection agreement is invalid as inconsistent with the Railway Labor Act.

Switchmen's Union v. *National Mediation Board*, 135 F. 2d 785 (C.A.D.C.), reversed on jurisdictional grounds, 320 U.S. 297, on which petitioner relies (Pet. 21–33), is not in conflict with the court of appeals decision here, as the court recognized when it stated (Pet. App. 19a):

> The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act[2] does not automatically render applicable the NMB's policy determination under the act that a class or craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect. Compare *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 792 (D.C. Cir. 1943), *rev'd on other grounds*, 320 U.S. 297 (1943).

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[2] Section 8 of the Employees Merger Protection Agreement provides: "The New Company [Burlington Northern] will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, *subject to changes in accordance with the provisions of the Railway Labor Act*, as amended, in the same manner and to the same extent as if the New Company had been a party thereto." (Pet App. 93a; emphasis supplied.)

Since *Switchmen's Union* involved a representational dispute rather than, as in the present case, the enforcement of a voluntarily undertaken obligation to recognize a pre-existing bargaining agreement, it is inapposite here.

In sum, it is the view of the National Mediation Board that the case was correctly decided by the court of appeals and presents no issue requiring determination by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, an Agency of the United States of America; and GEORGE S. IVES, DAVID H. STOWE, and PETER C. BENEDICT, Members of the National Mediation Board,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY TO FEDERAL RESPONDENTS' MEMORANDUM IN OPPOSITION

As the National Mediation Board ("NMB") recognizes (Fed. Resp. Mem. 5), the question presented is whether an agreement between a railroad and a union can give the union the right to be the collective bargaining representative of a group of employees that is not a carrier-wide craft or class, notwithstanding the provisions of

Section 2 Fourth of the Railway Labor Act prescribing "craft or class" representational units, and the provisions of Section 2 Eighth of the Act outlawing agreements that are inconsistent with Section 2 Fourth.

The NMB asserts that there is no conflict between the holding below that an agreement can give a union such a right and the contrary decision of the District of Columbia Circuit in the *Switchmen's Union* case,[1] because *Switchmen's Union* allegedly involved a "representational dispute" under Section 2 Ninth of the Railway Labor Act, rather than obligations arising from an agreement, governed by Section 2 Fourth, under which a union claims the right to represent a group that is not a system-wide craft or class (Fed. Resp. Mem. 5, 7).

The cases cannot be distinguished on that ground, as we show below. Moreover, the position taken by the NMB underscores the importance of the case. The NMB asserts that an agreement between a railroad and a union can give the union the right to represent a group of employees that is not a carrier-wide craft or class, but it also reaffirms its refusal to entertain petitions by members of such a group to change their representation (Fed. Resp. Mem. 5, n. 1). Thus, the position taken by the NMB deprives the majority of employees in the group of *any* way in which to change their representation, regardless of their wishes.

1. The NMB's position is erroneous.

At the outset, the NMB's position, agreeing with that of the American Railway Supervisors Association ("ARSA") and the court below, that the pre-merger agreement here could give ARSA the right to represent a group of employees that is not a carrier-wide craft or

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[1] *Switchmen's Union of N. America* v. *National M. Board*, 135 F.2d 785 (D.C. Cir. 1943), *rev'd for lack of jurisdiction*, 320 U.S. 297 (1943).

class (Fed. Resp. Mem. 7) is erroneous as a matter of law. As the Court is aware, ARSA was certified by the NMB as the representative of the Great Northern technicians many years before the Burlington Northern merger of the Great Northern and four other railroads on which ARSA did not represent technicians (Pet. 13a, 14a). At the time of the merger, however, only a quarter of the Great Northern technicians still belonged to ARSA, and another organization (the Great Northern Railway Company Technical Employees Association) claimed the support of a majority of the members of that group and had petitioned the NMB for certification as its representative (Pet. 52a; J.A. 100-102). After the merger the NMB dismissed the application of the GNRCTEA, without determining the preference of a majority of the group, on the ground that the dispute as to the representation of the group was moot because "the Great Northern had ceased to exist after the merger." (Fed. Resp. Mem. 5 n. 1; Pet. 53a.) Nevertheless, ARSA claims that a pre-merger agreement between the railroads and ARSA gives it the right to continue to represent the former Great Northern technicians, notwithstanding the merger; and the NMB has now endorsed the claim that such an agreement would be valid. Thus, if the NMB and the ARSA were correct, the employees in that group would be locked into representation by ARSA. The pre-merger agreement between the railroads and the union allegedly gives ARSA the right to represent the group; and there is no way for the employees in the group to change that representation, because the NMB has reaffirmed its refusal to entertain a petition for certification of a different representative for the group. Not only that, but the NMB now asserts that a vote against representation by ARSA on a system-wide craft or class basis did not dislodge it as the representative of the smaller groups it insists it represents (Pet. 11; Fed. Resp. Mem. 5 n. 1). In short, if the NMB

were correct, representation would be determined in this case not by the preference of a majority of the employees in the group without employer interference, but by an agreement between the employer and a union without regard to the employees' wishes.[2]

Such a result would be plainly inconsistent with the Railway Labor Act. Under Section 2 Fourth of the Act, a majority of the craft or class of *employees* determines representation;[3] under Sections 2 Third and 2 Fourth the *employer* cannot lawfully interfere with the exercise of that right;[4] under Section 2 Eighth agreements by an

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[2] In our reply brief (pp. 3-4) and also in letters to the Solicitor General and the General Counsel of the NMB, we urged the NMB to state the basis for its determination that the disappearance of the Great Northern "mooted" the dispute between ARSA and the GNRCTEA over the representation of the former Great Northern technicians even though ARSA continues to claim the right to represent that group and the GNRCTEA has never withdrawn its conflicting claim that it has the support of a majority of the members of the group. As we said in our reply brief, we believe that ruling simply reflected the Board's long-held view, stated in the *Switchmen's Union* case (Pet. 68a-78a), that "craft or class" representational units, for purposes of Section 2 Fourth of the Act, are carrier-wide in scope. No other explanation of the ruling makes any sense or has ever been suggested either by the NMB or by ARSA. Nevertheless, in the brief filed on behalf of the NMB at the request of the Court, the NMB simply reasserted the conclusion that the disappearance of the *railroad* mooted the controversy over the representation of the group of *employees* the two organizations continued to claim the right to represent, but gave no explanation or basis for that conclusion. (Fed. Resp. Mem. 5 n. 1). This litigation should not be treated as a guessing game. There is no reason why either the Mediation Board or the Solicitor General should be so reluctant to disclose the basis for the Board's position in terms that can be understood.

[3] "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act . . . ." 45 U.S.C. § 152 Fourth.

[4] "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or

employer that interfere with that right or are inconsistent with Section 2 Fourth are invalid;[5] and under Section 2 Tenth such interference is a crime.[6]

2. There is a conflict among the circuits.

The NMB's contention that the court of appeals' decision in the *Switchmen's Union* case does not conflict with the decision below (Fed. Resp. Mem. 6, 7) is equally erroneous. In that case the District of Columbia Circuit, following the clear language of the Act, held that Section 2 Fourth prescribes system-wide "craft or class" representational units; and and it therefore rejected a claim by a union that pre-consolidation agreements between it and a railroad could give the union the continuing right, after a railroad consolidation, to represent a group that was no longer a system-wide craft or class. That decision cannot be distinguished here.

In the *Switchmen's Union* case the Switchmen's Union claimed, just as ARSA does here, that agreements be-

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coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives . . . ." 45 U.S.C. § 152 Third. ". . . [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . ." 45 U.S.C. § 152 Fourth.

[5] ". . . The provisions of [Sections 2 Third and Fourth of this Act, inter alia] are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them." 45 U.S.C. § 152 Eighth.

[6] "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of [Sections 2 Third, Fourth, and Eighth of the Act, inter alia] shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply . . . shall constitute a separate offense . . . ." 45 U.S.C. § 152 Tenth.

tween it and certain railroad parties to a railroad consolidation gave the union the right, after the consolidation, to continue to represent groups it had represented before, although those groups were no longer system-wide crafts or classes. Thus, the Court of Appeals stated:

> "The remaining question concerns the propriety of the Board's finding that all the yardmen employed by the [consolidated New York Central Railroad Company] constitute a single class or craft. The issue is whether, when the employees of a single craft or class have organized, bargained, and made contracts with their employer by groups or divisions, the Board is compelled, upon a proper invocation of its services, to destroy these groupings by forcing the same into a single bargaining unit. Appellants [the Switchmen's Union representatives] admit that, were there no separate existing contracts as here, the action of the Board in unifying the Railroad Company might be proper. . . ." 135 F.2d at 792.[7]

The Court of Appeals rejected the union's claim that pre-consolidation agreements could give the union the right to represent less than a system-wide craft or class on the consolidated railroad as a whole, basing its holding squarely on Section 2 Fourth of the Act, the result

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[7] The contractual provision on which ARSA bases its representation claims said *only* that the merged railroad would assume pre-merger agreements as to pay and working conditions "subject to changes in accordance with the provisions of the Railway Labor Act" (Pet. 28a)—a provision with which Burlington Northern believes it has complied because the only changes it has made in pay and working conditions have been made in accordance with the Act as the railroad understands its obligations thereunder—whereas the opinion in the *Switchmen's Union* case does not indicate the terms of the agreement provisions on which the Switchmen's Union relied. The point here, however, is that the Switchmen's Union claimed, just as ARSA does here, that pre-merger agreements gave it the right to continue to represent a group that was not a system-wide craft or class on the merged railroad as a whole.

Burlington Northern advocates here. The Court of Appeals stated:

> ". . . We believe appellants come close to admitting themselves into a losing position. The Act plainly provides [in Section 2 Fourth] that the *majority* of any craft or class shall determine *the representative* (not representatives) of the craft or class for the purposes of the Act. Appellants cannot complain of interference with their contracts if the provision is a lawful exercise of Congressional authority. Their contracts were necessarily made subject to that authority.
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> ". . . It is . . . clearly stated [in Section 2 Fourth] that not any group, part or division of a craft or class is entitled to a representative of its own choosing, but that only the 'majority of any craft or class of employees' may do so. Appellants have cited cases which hold that Congress intended employees to be given the right to retain the crafts or classes . . . established by mutual agreement between employee and carrier.[8] It is sufficient, however, to say that these cases were concerned with disputes as to the craft or class to which the nature of an employee's work entitled him to belong, and not with the area which was to be considered the compass of that craft or class. . . .
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> "We . . . deny that Congress intended any geographical or divisional connotation to be given to the term 'craft or class'; it was intended only in the occupational or functional sense and not in the fractional, divisional, or regional sense." 135 F.2d at 792-793 (emphasis in original).

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[8] Those cases included *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F.2d 780 (D.C. Cir., 1943); *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F.2d 757 (D.C. Cir., 1936); *Brotherhood of Clerks* v. *Nashville, C. & St. L. R. Co.*, 94 F.2d 97 (6th Cir., 1937).

The court of appeals' ruling affirmed the NMB's identical ruling in the case, which likewise was based squarely on Section 2 Fourth (Pet. 76a-77a).

The court of appeals and the NMB both based their interpretation of Section 2 Fourth on legislative history that demonstrated (a) that Congress intended the "craft or class" representational units prescribed by Section 2 Fourth to be system-wide in scope, and (b) that Congress did not intend to permit agreements between railroads and unions to override the statutory provision for system-wide "craft or class" representational units. Thus, as noted in our petition (Pet. 20), the court stated that during the congressional committee hearings on the Act the railroads' principal representative

> "opposed the majority rule provisions because he apparently thought that the craft or class unit was to be carrier wide. . . . He urged, but was unable to persuade, the Interstate and Foreign Commerce Committee of the House to add the following proviso . . . : 'Provided, that only each class or craft *embraced in any existing agreement* shall be the employees to be considered to determine the majority of such employees for the purposes of representation.'" 135 F.2d at 795 (emphasis in original).[9]

Thus, the decision below and the decision in the *Switchmen's Union* case are directly in conflict. In *Switchmen's Union* the court held that Section 2 Fourth prescribes system-wide craft or class representational units, and it

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[9] So too, the Court of Appeals pointed out that during the committee hearings the principal author of the Act, Joseph B. Eastman —in response to the question whether under the Act the employees in a particular shop could get together and bargain with their employer—explained that the term "craft or class" would not refer to "those that did work in a particular shop, but it would be all of the employees of the carrier, no matter in what shop they were located, who did that particular kind of work . . . . for that particular employer." 135 F.2d, at 795. The full quotation is set out in our petition, at 21.

therefore rejected a claim by a union that an agreement between it and a merging railroad gave it the right to represent a group of the railroad's employees after the merger although the group did not constitute a system-wide craft or class on the merged railroad as a whole. The court below held, however, that an agreement could give ARSA just such a right.

To be sure, in the *Switchmen's Union* case the court held further that *since* Section 2 Fourth prescribes system-wide craft or class representational units, the NMB lacks the power under Section 2 Ninth of the Act[10] to certify representatives for groups that are not system-wide craft or class units. The NMB now claims that *Switchmen's Union* is therefore "inapposite" because the instant case does not involve a "representational dispute" under Section 2 Ninth. (Fed. Resp. Mem. 7.) But even a cursory reading of *Switchmen's Union* shows that the decision turned on the interpretation of Section 2 Fourth, not Section 2 Ninth. The issue there—and here—was the scope of the representational unit. That is prescribed by Section 2 Fourth and does not depend on the existence of certification proceedings under Section 2 Ninth. On the contrary, the rights and obligations prescribed by Section 2 Fourth are unconditional. As stated above, Section 2 Fourth provides:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class

[10] Section 2 Ninth provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier . . . ." 45 U.S.C. § 152 Ninth.

> of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . . [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . ."

Moreover, the NMB's claim that the *Switchmen's Union* decision is "inapposite" because no employee group has challenged ARSA's representational claims under Section 2 Ninth is irreconcilable with the NMB's dismissal of such a challenge by the GNRCTEA on the ground that the issue as to the representation of the former Great Northern technicians ARSA claims the right to represent is now "moot" because of the merger. As we have said, that conclusion can be justified only by the very proposition for which the *Switchmen's Union* decision stands—that after a merger employee groups on separate merging railroads are not proper representational units under Section 2 Fourth because they are no longer system-wide craft or class units.[11]

3. The question presented is important.

It is genuinely important for this Court to decide the question presented. The NMB's position locks employees into representation allegedly agreed to by an employer

[11] The NMB also indicates that it does not agree that the merger protection agreement could not and did not override inconsistent representation provisions in the Railway Labor Act (Fed. Resp. Mem. 5-6), but it does not purport to state the ICC's view regarding that issue. There was no discussion of representation in the ICC decision approving the merger (Pet. 45a-49a), and, as we said in our reply brief, the notion that the Commission involved itself with representational issues will come as a surprise to the Commission, which affords identical protection in railroad mergers to both represented and unrepresented employees without inquiring into representation. See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 347 I.C.C. 536, 548-549 (1974). In any event, the question whether a merger protection agreement can override the representation provisions of the Railway Labor Act is itself a question that warrants review by this Court for reasons stated in our petition (Pet. 23-25).

and a union and presents issues of equal importance for railroads. Following the NMB's dismissal of the GNRCTEA application, there was no way for the Burlington Northern to proceed without risking a charge that it had interfered with its employees' rights under Section 2 Fourth. If it had continued to treat ARSA as the representative of the Great Northern technicians in the face of the NMB determination that the dispute between ARSA and the GNRCTEA as to the representation of that group had been mooted by the merger, it risked violating the rights of employees who preferred not to be represented by ARSA. On the other hand, if it did not treat ARSA as the representative of the group, it risked violating the rights of the employees who still adhered to ARSA. Unlike ARSA, the railroad could not seek a determination of the question by the NMB, because the NMB will not entertain *employer* applications for a determination of such questions.[12] The railroad proposed in these circumstances to arbitrate the issue, but ARSA refused to arbitrate except on a basis that would pretermit the Railway Labor Act issues (Pet. 9-10). The railroad then instituted this action to obtain a judicial determination, and is now faced with a claim for $1 million in damages for having done so—a claim to which the court below instructed the District Court to give further consideration. If the railroad had chosen instead to accede to ARSA's demands, it is just as likely that it would now be faced with damage claims by those employees who sought to challenge ARSA's right to represent the Great Northern technicians.

This situation is intolerable. The question presented should be decided authoritatively, and the conflicts outlined in the petition for certiorari should be resolved, so

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[12] NMB, 38th Ann. Rep. 30 (1973); *Railway Clerks* v. *Employees Ass'n*, 380 U.S. 650, 666 (1965).

that railroads, employees, and unions will all know exactly where they stand.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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